No. 84-1654

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In the Supreme Court of the United States

OCTOBER TERM, 1984

RITA M. LAVELLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, in her defense to a prosecution for perjury and making false statements, should have been permitted to cross-examine a lawyer for the government agency of which petitioner was an official about an alleged ethical violation by the lawyer.

2. Whether the district court abused its discretion under Fed. R. Evid. 404(b) in admitting evidence of uncharged acts of misconduct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 751 F.2d 1266.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on January 18, 1985, and a petition for rehearing was denied on February 20, 1985 (Pet. App. 33a). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner formerly was the Assistant Administrator of the Environmental Protection Agency (EPA) in charge of its Office of Solid Waste and Emergency Response. She was convicted in the United States District Court for the District of Columbia, after a jury trial, on one count of making

a false statement to EPA, in violation of 18 U.S.C. 1001; one count of endeavoring to obstruct an inquiry by a congressional committee, in violation of 18 U.S.C. 1505; and two counts of perjury before congressional committees, in violation of 18 U.S.C. 1621.[1] She was sentenced to concurrent terms of one to three years' imprisonment on each count, with all but six months suspended in favor of five years' probation; she also was fined a total of $10,000 (Pet. App. 28a-29a). The court of appeals affirmed (Pet. App. 1a-26a).

1. a. As summarized in the opinion of the court of appeals (Pet. App. 2a-7a), the government's evidence at trial showed that, prior to assuming her position as EPA Assistant Administrator, petitioner was Director of Communications for the Aerojet Liquid Rocket Company, a division of the Aerojet-General Corporation (Tr. 420-421). During the confirmation process, petitioner wrote a memorandum to Robert Perry, General Counsel of EPA, in which she agreed not to participate in any EPA matter that specifically involved Aerojet-General or its subsidiaries (Tr. 332, 970-971; C.A. App. 1158). She orally confirmed that written commitment during her confirmation hearings on March 23, 1982 before the Senate Committee on Environment and Public Works (*ibid.*). Pet. App. 2a.

During a May 28, 1982 staff meeting at which petitioner was present, the participants discussed a matter involving a toxic waste disposal site located in California known as the "Stringfellow site." During the meeting, Edward Kurent, EPA Associate Counsel for Hazardous Waste, informed petitioner that Aerojet-General was included on the list of parties who were potentially responsible for cleaning up the site and that she should consider recusing herself from

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[1]Petitioner was acquitted by the jury on an additional perjury count (Pet. App. 7a).

further participation in the matter (Pet. App. 3a; Tr. 77-78, 92, 170-171, 180-190). In addition, a briefing paper shown to petitioner at that time contained a list of parties responsible for the toxic waste. A page of the list that she examined showed Aerojet-General as a responsible party (Tr. 78, 171-172). When petitioner inquired of her staff whether the information concerning Aerojet-General was correct, they responded that it was (Tr. 79, 153, 171). Following receipt of this information, petitioner did not recuse herself from further participation in the Stringfellow matter, as Kurent had suggested; she instead continued to participate in the meeting and conduct discussions with her staff about the Stringfellow site (Tr. 141-142, 152-153, 177, 190-192).

On May 31, 1982, petitioner telephoned John Andreason, General Counsel and Vice President of Aerojet-General. During the conversation, she warned him that Aerojet-General had been identified as a distributor of toxic waste, discussed the remedial actions that had been proposed by others and decided upon by EPA, and stated that, because of Aerojet-General's involvement, she would have to recuse herself from participation in the matter (Tr. 420-424). On June 1, 1982, petitioner attended a second staff meeting concerning the Stringfellow matter, at which she participated in discussions concerning the sending of notices to responsible parties (Tr. 26-28). On June 3 or 4, petitioner told her confidential assistant that Aerojet-General was a contributor at the Stringfellow site (Tr. 523-524). The following week, Deborah Dalton, a scientist on petitioner's staff, prepared a memorandum outlining the action she believed EPA's regional office should take with respect to the Stringfellow site. On June 14, petitioner instructed her staff to send an "eyes only" copy of the Dalton memorandum to the EPA regional administrator (Tr. 174-175, 221-223). Pet. App. 3a.

When Kurent learned that petitioner had communicated with the EPA regional administrator concerning the Stringfellow matter, he suggested to EPA's General Counsel, Robert Perry, that he (Kurent) draft a site-specific recusal statement and present it to petitioner for her signature (Tr. 194-195). After Perry agreed, members of Kurent's staff drafted the recusal statement, and petitioner signed it on June 18, 1982 (GX 34; C.A. App. 1159). Pet. App. 4a.

b. In the late summer of 1982, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce requested information from EPA relating to three hazardous waste sites, including the Stringfellow site (Tr. 281-282; C.A. App. 1194, 1197). In reviewing documents relevant to a subpoena issued by the Subcommittee, Michael Brown, EPA's Deputy General Counsel, discovered the Dalton memorandum and its transmittal to the regional adminstrator. Because the document suggested that petitioner had not fulfilled her March 23, 1982 promise to the Senate Committee not to participate in matters affecting Aerojet-General, Brown recommended to EPA General Counsel Robert Perry that the House Subcommittee should be apprised of the document. Pet. App. 4a.

After reviewing Brown's recommendation, Perry arranged for a meeting attended by EPA Administrator Ann Burford, EPA Chief of Staff John Daniel, Perry, and petitioner. When confronted with the apparent violation of her recusal promise, petitioner defended her actions by pointing out that the Dalton memorandum predated her June 18 site-specific recusal and maintaining that she had not learned of Aerojet-General's involvement at the Stringfellow site until just a few days prior to execution of the recusal (Tr. 349-350). Burford then directed that the Dalton memorandum be furnished to the Subcommittee and that petitioner prepare an affidavit explaining her involvement

with the Stringfellow site for transmittal to the Subcommittee with the memorandum (Tr. 350, 355). Pet. App. 4a.

On December 14, 1982, a copy of the Dalton memorandum was furnished to the House Subcommittee. Accompanying it was a "Statement of Certification," signed by petitioner. The Statement was initially drafted by Acting Deputy EPA General Counsel Gerald Yamada but was thereafter revised by petitioner based on her knowledge of relevant facts (Tr. 375-380, 403-404, 409, 412, 975, 978-979). The document stated (C.A. App. 1091 (emphasis in original); Pet. App. 5a):

> As part of a follow-up to the briefing, an enforcement briefing was scheduled on Thursday evening, June 17. At that time, for the *first* time, I was told that an Aerojet-General subsidiary was cited as one of the possible responsible parties. I immediately left the briefing and executed a recusal statement (dated June 18) which is attached.

The false statement and obstruction counts (Counts 1 and 2) are based upon this averment. Pet. App. 4a-5a.[2]

On February 23, 1983, petitioner testified under oath before the Senate Committee on Environment and Public Works (Tr. 255-257). During her testimony, she stated that she "found out Thursday night [June 17, 1982] for the first time that Aerojet was one of the many companies who had dumped at [the Stringfellow] site, and then I recused myself according to my commitment to this committee" (Pet. App. 6a (emphasis added)). On the following day, petitioner gave substantially the same testimony before the Subcommittee on Investigations and Oversight of the House Committee

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[2]At trial, petitioner testified that the statement was accurate, that she could have included in the statement whatever she wanted to, and that "no one made [her] say that" (Tr. 978-979).

on Public Works and Transportation (Tr. 267-270). Specifically, she testified that she "had no knowledge whatsoever that * * * one of Aerojet-General's subsidiaries, would be one of the 250 universe [potential disposers] until * * * Thursday evening * * * [June] 17th. Thursday evening, is when for the first time I saw the list of disposers . . . I left the meeting and my staff prepared a letter of recusal which I signed the next morning" (Pet. App. 6a-7a (brackets in original)). These false statements to the Senate and House Committees formed the basis of the perjury counts (Counts 3 and 4) on which petitioner was convicted.

2. a. At trial, EPA attorney Michael Brown testified as a government witness concerning his discovery in December 1982 of the Dalton memorandum, his discussion with Perry concerning the document, and a subsequent opportunity given petitioner "to express her views of what happened" (Tr. 300-304).[3] During cross-examination, counsel for petitioner elicited from Brown admissions that he had professional differences with petitioner, that the two "had * * * different view[s] of public service," and that he had lodged complaints about her on several occasions (Tr. 327-328). The following colloquy then took place (Tr. 340-342; Pet. App. 9a-10a):

> Q: [By Defense Counsel] Let's go back to your duties as ethics officer. Where did you attend law school?
>
> A: [By Mr. Brown] Saint Mary's University, University of Virginia and Georgetown University Law Center.
>
> Q: And I assume you studied the Code of Responsibility there did you not?

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[3]Brown's direct testimony in its totality is contained in approximately 10 pages of the trial transcript (Tr. 295-305).

A: Yes.

Q: And you are aware of the Code of Professional Responsibility?

A: As a general code, I would hate to have to recite any particular specific section thereof.

Q: Well, as ethics officer assistant, you examined it from time to time, didn't you?

[By the Prosecutor]: Objection, your honor. Outside the scope and irrelevant.

The Court: Clearly outside the scope.

[By Defense Counsel]

Q: Are you familiar with—let me try this again, your honor.

The Court: As I said, it is clearly outside the scope of direct examination.

At which time the parties approached the bench:

[Defense Counsel]: Your honor, I just want to ask him about one specific provision of the code to see if he is aware of it.

The Court: Which Code?

[Defense Counsel]: The one in effect in the District of Columbia. He is a member of the bar here.

[Prosecutor]: Your honor, what counsel is doing is trying to put his case in through our witness. If he wants to call the witness, he is free to do it.

The Court: He certainly is. But you are talking about the Code of Professional Responsibility?

[Defense Counsel]: Yes.

The Court: It has absolutely nothing to do with this case, certainly not on cross-examination.

b. EPA Deputy Counsel Gerald Yamada also testified on the government's behalf. He testified that, after he drafted the Statement of Certification, petitioner added a paragraph to the document detailing the events of June 14, 1982, of which he had no knowledge (Tr. 376-378). On cross-examination, Yamada acknowledged that, after petitioner executed the statement, he telephoned Kurent and learned that there was an inconsistency between her averment in the document and Kurent's recollection as to when she first learned of Aerojet-General's involvement in the Stringfellow matter. Yamada further acknowledged that he did not then call the inconsistency to petitioner's attention or attempt to prevent EPA's sending of the Statement of Certification to the House Committee. Yamada explained that when he told Perry of the inconsistency, Perry said that petitioner was so sure of her facts that he would give her the benefit of the doubt. Tr. 406-410.

In addition, the government presented evidence at trial of two other occasions on which petitioner presented false testimony. The first involved an April 8, 1982 meeting between petitioner and two New York State waste management officials. The two testified that, during the meeting, petitioner angrily complained that her Senate confirmation had almost been held up because of a letter one of them had written to Senator Moynihan concerning the waste disposal problem at Love Canal. A video-taped segment of petitioner's testimony during the February 1983 Senate Committee hearings showed that she testified that she had never told the official that his letter held up her confirmation (C.A. App. 1152). Pet. App. 14a-15a.

The second incident of false testimony occurred when, during the House and Senate hearings in February 1983, petitioner testified that she had voluntarily turned over her 1982 appointment calendars to the Committees; that she had not been given access to her records for the purpose of

preparing her testimony; and that no one had delivered any documents from her office to her following her termination with the agency on February 4, 1983. Susan Baldyga, petitioner's former Special Assistant, and Henrietta Janiszewski, her former Confidential Assistant, testified that although petitioner had turned over to the congressional committees two appointment calendars, she retained a third calender that she had maintained for personal matters and official responsibilities, including "industry-type appointments" (Pet. App. 15a). In addition, Baldyga testified that, on the day after petitioner's employment with EPA was terminated, she (Baldyga) and Janiszewski removed certain documents from petitioner's office and, while petitioner watched, placed them in an automobile belonging to petitioner's director of public relations. She further testified that the documents were later observed in petitioner's apartment. Pet. App. 15a-16a.

3. a. On appeal, petitioner maintained, inter alia, that, by foreclosing cross-examination of Brown concerning possible ethical violations, the district court precluded her from arguing that EPA attorneys had a "grudge" against her and had attempted to "set her up" and that such actions by the attorneys might have been motivated by a desire to avoid prosecution or to obscure violations of professional ethics. The court of appeals rejected those contentions (Pet. App. 11a-13a). The court of appeals observed that defense counsel had not explained to the district court that his reason for asking Brown whether he was aware of the Code of Professional Responsibility was to establish bias (*id.* at 11a). The court also observed that petitioner's cover-up theory was logically inconsistent, because, if the EPA attorneys had truly engaged in unethical conduct, they would have wanted to exculpate petitioner and (thereby) themselves, and would not have testified that they knew petitioner's statement to have been false when it was

submitted to Congress (*id.* at 11a-12a). The court further observed that, in any event, the jury was exposed to the facts upon which her claim of bias was based (*id.* at 12a-13a).

b. The court of appeals also rejected petitioner's contention that the uncharged incidents of false testimony were erroneously admitted into evidence (Pet. App. 14a-26a). The court held that the evidence was relevant to establish petitioner's subjective intent (*id.* at 18a-19a) and that the district court did not err in finding that its probative value outweighed any prejudicial impact (*id.* at 20a-24a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court of petitioner's fact-bound claims is not warranted.

1. Petitioner first contends (Pet. 12-27) that the district court erred in not permitting cross-examination of EPA attorneys concerning possible ethical violations. In particular, petitioner argues that she had an attorney-client relationship with the EPA attorneys, that by virtue of that relationship they had an ethical obligation to alert her to inconsistencies between her account of events in the Statement of Certification and Kurent's recollection, and that she would have been able to show bias on the part of the lawyers by establishing that they knowingly breached this alleged ethical obligation. See Pet. 15-17, 25-26. There are numerous flaws in petitioner's contention that her conviction should be set aside on this ground.

a. Although petitioner frames her argument broadly in terms of her being denied the opportunity to cross-examine the EPA "attorneys," in fact Michael Brown was the only attorney petitioner attempted to cross-examine at trial concerning his familiarity with the Code of Professional Responsibility. See pages 6-7, *supra*. As the court of appeals

pointed out (Pet. App. 11a n.8), defense counsel did not attempt to cross-examine Kurent or Yamada regarding their familiarity with the Code of Professional Responsibility or possible ethical violations (see Tr. 197-210, 214-216, 381-411), even though counsel did elicit from Yamada an admission that he did not contact petitioner after he learned that Kurent's recollection was inconsistent with petitioner's account in the Statement of Certification (Tr. 408-410).[4]

b. Even as to Brown, petitioner failed to preserve for appeal her current contention that cross-examination by reference to the Code of Professional Responsibility was necessary to establish bias. " 'It is axiomatic that the trial court must be apprised of the purpose of any inquiry to which objection is made.' " *United States* v. *Edwards,* 696 F.2d 1277, 1281 (11th Cir.), cert. denied, 461 U.S. 909 (1983), quoting *United States* v. *Garcia,* 531 F.2d 1303, 1307 (5th Cir.), cert. denied, 429 U.S. 941 (1967). See, *e.g., United States* v. *Sampol,* 636 F.2d 621, 649-650 (D.C. Cir. 1980); *Cheek* v. *Bates,* 615 F.2d 559, 563 (1st Cir.), cert. denied, 446 U.S. 944 (1980). Consistent with this principle, Fed. R. Evid. 103(a)(2) limits reversible error to instances in which "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." As the court of appeals observed, " '[r]eversal for * * * denial of the right to show bias on cross-examination thus requires both an affirmative assertion of that right and a knowing decision by the judge to deny or limit it' " (Pet. App. 11a (brackets in original), quoting *Cheek* v. *Bates,* 615 F.2d at 563). In this case, however, as the court of appeals further observed (Pet. App. 11a), during the bench conference concerning the

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[4]Former EPA General Counsel Perry did not testify at trial (Pet. App. 11a n.8).

question referring to the Code of Professional Responsibility, counsel merely stated that he "just want[ed] to ask [Brown] about one specific provision of the Code to see if he is aware of it" (Tr. 340-342). He did not identify any purpose to try to establish by this line of inquiry the existence of possible bias on the part of Brown. The current claim that the inquiry was proper to establish bias therefore was waived, and it is not properly before this Court.

c. In any event, there is no basis for the contention that Brown or other EPA attorneys owed an ethical obligation to petitioner to call her attention to inconsistencies between Kurent's recollection and her own Statement of Certification. As petitioner conceded in district court (C.A. App. 306), the EPA attorneys had no personal attorney-client relationship with petitioner. They were attorneys for EPA, and their duties of loyalty and confidentiality ran to the agency, their client. Accordingly, EPA could waive the attorney-client evidentiary privilege as regards any communications between petitioner and EPA attorneys (see *CFTC* v. *Weintraub,* No. 84-261 (Apr. 26, 1985)), and the lawyers were required to act in conformity with their duties as attorneys for the agency, as they understood those duties to be, whether or not their actions were consistent with the personal interests of petitioner.

Moreover, at the time when, petitioner asserts, EPA attorneys should have advised her of the inconsistency between her recollection and that of Kurent, she already had signed and submitted to EPA the Statement of Certification, which contained false statements of material facts concerning when she first learned of Aerojet-General's involvement in the Stringfellow site. That false statement concerned matters within the jurisdiction of EPA, and its submission to EPA therefore violated 18 U.S.C. 1001. *United States* v. *Rodgers,* No. 83-620 (Apr. 30, 1984). Indeed, the false statements in the Statement of Certification formed

the basis of Count 1 of the indictment, which charged a violation of 18 U.S.C. 1001 (C.A. App. 12-13) and on which petitioner was convicted in this case (Pet. App. 5a & n.3). The EPA attorneys clearly owed petitioner no ethical duty in connection with her submission of a false statement to EPA. Cf. *Clark* v. *United States,* 289 U.S. 1, 15 (1933). To the contrary, as we have said, their duty of loyalty was to EPA, and the agency had an interest in learning of any evidence of wrongdoing by petitioner while serving in the agency. Cf. *CFTC* v. *Weintraub,* slip op. 9-10. EPA General Counsel Perry chose to give petitioner the benefit of the doubt at the time she submitted the Statement of Certification, by transmitting the Statement to the congressional committee notwithstanding Kurent's contrary recollection. Petitioner can claim no immunity from criminal prosecution for her own false representations in that Statement (much less the perjurious testimony she subsequently gave before the congressional committees) by second-guessing Perry's decision to send the Statement to the House Committee.

d. Finally, there was abundant evidence before the jury from which petitioner could argue impropriety by EPA attorneys in the preparation and submission to Congress of the Statement of Certification and bias against petitioner. Deputy General Counsel Yamada admitted on cross-examination that, after petitioner revised and signed the Statement, he as well as EPA attorneys Perry and Kurent knew that it contained an inconsistency as to when she first learned of the Stringfellow matter, but that none of them apprised her of the error or afforded her the opportunity to correct it before it was transmitted to Congress (Tr. 407-411). And Brown, the EPA attorney to whom the cross-examination at issue was directed, acknowledged that he had professional differences with petitioner regarding the manner in which she performed her duties and that he had complained to superiors about her conduct. See page 6,

supra. As the court below observed (Pet. App. 12a), the jury therefore was fully exposed to the underlying facts upon which her arguments of bias and being "duped" by EPA attorneys were based.[5] Accordingly, cross-examination by reference to the Code of Professional Responsibility to illuminate petitioner's strained theory of an ethical violation would have added little.

2. Petitioner also argues (Pet. 27-30) that the district court improperly admitted under Fed. R. Evid. 404(b)[6] evidence that, during hearings before the congressional committees on February 22 and 24, 1983, she gave false testimony regarding whether she had accused a New York environmental official of delaying her confirmation and whether she had voluntarily surrendered all her 1982 appointment calendars and other office documents following termination of her employment. See pages 8-9, *supra*. Petitioner maintains that those events "were totally unrelated" to her actions in connection with the false Statement of Certification she executed on December 12, 1982, and "had no relevance to her intent to deceive when she

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[5]It is difficult in any event to understand the relevance to petitioner's defense of lack of intent of the EPA attorneys' alleged breach of an ethical obligation to correct factual inaccuracies in the Statement or to bring them to her attention. Petitioner acknowledged on cross-examination that no one forced her to make or sign the Statement of Certification, and, as the court below noted, the statutes under which petitioner was convicted "do[] not require that the defendant knowingly deceive *despite* adequate legal counsel." Pet. App. 13a n.10 (emphasis in the original).

[6]Fed. R. Evid. 404(b) provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

signed the Statement" (Pet. 28). This argument is without merit.

In the first place, petitioner's claim that these events were unrelated and have no relevance to one another is simply incorrect. As petitioner concedes (Pet. 30), the perjury counts relating to her false testimony before congressional committees "involved [petitioner's] intent to deceive Congress on the same facts which were contained in the Statement of Certification" executed two months earlier. The testimony resulting in those perjury convictions occurred on the same days as the acts of uncharged false testimony of which petitioner now complains. As the court below explained, evidence of these uncharged acts of perjury "was offered to establish a critical and seriously contested issue in the trial—[petitioner's] specific intent to deceive"—and to rebut her claim that her false statements concerning the sequence of events in the Aerojet-General matter were merely "innocent mistakes" (Pet. App. 21a-22a). If such evidence was probative of her intent to deceive during the February 1983 hearings—which petitioner does not dispute —it also was relevant to her intent in making identical statements in a written document transmitted to Congress little more than two months earlier. As the court of appeals observed, "both involved misrepresentations concerning the propriety of her conduct as the Assistant Administrator of the EPA" (Pet. App. 21a).

Moreover, the fact that the uncharged acts of misconduct occurred after the execution of the Statement of Certification does not affect their admissibility as to the counts that were based on that Statement. Evidence of subsequent similar acts of misconduct is fully admissible to prove guilty knowledge or intent on an earlier occasion, if they were not too remote in time. That is especially so where, as here, the events are interrelated. See, *e.g.*, *United States* v. *Gallo*, 543 F.2d 361, 365 (D.C. Cir. 1976) (uncharged offense

which occurred two months after charged offense); *United States* v. *Moschiano*, 695 F.2d 236, 243-244 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983) (three months); *United States* v. *Fischel*, 693 F.2d 800, 802-803 (8th Cir. 1982) (two months).[7] The court of appeals therefore did not err in this case in admitting into evidence the similar acts of false statements by petitioner to Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1985

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[7]In *United States* v. *James*, 555 F.2d 992, 1000-1001 (D.C. Cir. 1977), the only decision cited by petitioner, the court found in the particular circumstances presented that the probative value of the subsequent criminal act was "so weak" that, especially in light of the "sordid incidentals" of that act, the probative value was outweighed by the prejudicial impact of the evidence. Moreover, the court of appeals in this case cited its own prior decision in *James* (see Pet. App. 17a & n.11) and obviously did not see any conflict between the two.